No. 88-761

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

LESTER YODER,
Petitioner,

vs.

ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL OF THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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I.

QUESTION PRESENTED

Whether Revocation Of One's Teaching Certificate And Deprivation Of Customary Livelihood Are Restraints Of Liberty Sufficient To Satisfy The "In Custody" Requirement Of 28 U.S.C. §2241 For Federal Habeas Corpus Jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner, Lester Yoder, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final on September 8, 1988, when the Sixth Circuit affirmed the District Court's dismissal of petitioner's Petition For Writ Of Habeas Corpus.

OPINIONS OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit affirming the District Court's dismissal of petitioner's Petition For Writ of Habeas Corpus is attached hereto as Appendix "A" *infra*, at page A1. The Memorandum Opinion and Judgment Entry filed by the United States District Court for the Northern District of Ohio is attached hereto as Appendix "B" *infra*, at page A4.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Sixth Circuit was made final on September 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution Of The United States

Amendment V:

"... nor be deprived of life, liberty, or property, without due process of law ..."

Amendment XIV:

"... nor shall any State deprive any person of life, liberty, or property without due process of law ..."

28 U.S.C. §2241: Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 **U.S.C. §2254: State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or

that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order

directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the Court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Ohio Revised Code

§2907.03 Sexual battery

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

* * * * *

(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over such other person.

(B) Whoever violates this section is guilty of sexual battery, a felony of the third degree.

§3319.31 Revocation of certificate

(A) If at any time the holder of a certificate is found intemperate, immoral, incompetent, negligent, or guilty of other conduct unbecoming to his position, the state board of education shall revoke the certificate, unless the finding is based upon a conviction of which the state board of education was notified under division (B) of this section. If the finding is based upon such a conviction, the state board of education initially shall suspend the person's certificate, with the final disposition of the certificate to be governed by the division. If the person whose certificate was suspended does not appeal the conviction upon which the suspension is based, or if he appeals the conviction and the

conviction is upheld on appeal and no subsequent appeal is taken, the state board of education shall revoke the certificate. The state board of education shall not revoke a certificate that has been suspended pursuant to this division during the pendency of any appeal of the conviction or at any time prior to the expiration of the applicable period for the filing of a notice of appeal relative to the conviction. If the person whose certificate was suspended appeals the conviction upon which the suspension is based, and the conviction is reversed on appeal the person's certificate shall be reinstated. The evidence upon which a finding under this division is based shall be presented in writing, of which the accused shall be notified, and no certificate shall be suspended or revoked without a personal hearing in accordance with Chapter 119 of the Revised Code.

(B) Whenever any person holding a valid teaching certificate issued pursuant to sections 3319.22 to 3319.31 of the Revised Code pleads guilty to or is convicted of any felony, any violation of section 2907.04 or 2907.06, or division (A) or (C) of section 2907.07 of the Revised Code, any offense of violence, theft offense, or drug abuse offense that is not a minor misdemeanor, or any substantively comparable ordinance of a municipal corporation, the prosecutor in the case shall, on forms prescribed and furnished by the state board of education, promptly notify the state board of education and any employing board of education of the person's name and residence address, the fact that the person pleaded guilty to or was convicted of such an offense, the section of the Revised Code violated, and the sentence of the court.

As used in this section, "theft offense" has the same meaning as in section 2913.01 of the Revised Code, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code, and "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals succinctly stated the relevant facts:

> On March 19, 1985, Yoder was convicted, in the Common Pleas Court of Wayne County, Ohio, of one count of sexual battery as that offense is defined by Ohio Revised Code ("O.R.C.") section 2907.03(A)(6).
>
> On May 16, 1985, the trial court sentenced Yoder to a prison term of one and one-half years. This term, however, was suspended and Yoder was placed on probation for two years. Thus, Yoder's probationary period ended May 16, 1987.
>
> Furthermore, as a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.
>
> Yoder appealed his conviction to both the state court of appeals and the state supreme court. On February 5, 1986, the court of appeals affirmed his conviction and on May 14, 1986, the supreme court overruled his motion for leave to appeal.
>
> Thereafter, on July 30, 1987, Yoder filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 (1982), in the United States District Court for the Northern District of Ohio. Yoder alleged four grounds for relief, including claims relating to assistance of counsel and procedural due process. His petition was originally referred to a magistrate who recommended that it be dismissed for lack of jurisdiction since there had not been a

showing that Yoder was in the "custody" of the State of Ohio; a requirement of the statute under which he was proceeding.

Yoder filed timely objections to the magistrate's report, contending that the district court had jurisdiction because although his suspended sentence and probation period expired prior to the filing of his habeas corpus petition, the revocation of his teaching certificate constituted a restraint of liberty sufficient to satisfy the "in custody" requirement of §2254.

On October 29, 1987, the district court issued its opinion holding that it lacked jurisdiction to grant Yoder any relief. The court held that under *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the revocation of Yoder's teaching certificate was a "collateral consequence" of his conviction and went only to the issue of "mootness", not to the relevant issue of "jurisdiction."

Yoder v. Celebrezze (September 8, 1988), C.A. 6 No. 87-4094, unreported at A2-A4.

The Sixth Circuit Court of Appeals affirmed that decision on September 8, 1988.

STATEMENT OF THE FACTS

The chronology set forth in the preceeding segment governs this section as well, and is incorporated by reference herein. No evidentiary hearing was held as the jurisdictional basis delineated within was interposed to deny the relief sought.

REASONS FOR GRANTING THE WRIT

WHETHER REVOCATION OF ONE'S TEACHING CERTIFICATE AND DEPRIVATION OF CUSTOMARY LIVELIHOOD ARE RESTRAINTS OF LIBERTY SUFFICIENT TO SATISFY THE "IN CUSTODY" REQUIREMENT OF 28 U.S.C. §2241 FOR FEDERAL HABEAS CORPUS JURSIDICTION.

Petitioner's prayer for habeas corpus relief, which was rejected by the District Court and the Sixth Circuit for lack of jurisdiction, is based on 28 U.S.C. §2254, which this Court has held is entitled to a liberal construction:

> [W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements . . . *That same theme has indelibly marked our construction of the statute's custody requirement.* (Emphasis added).

Hensley v. Municipal Court, 411 U.S. 345, 350 (1973).

Moreover, the jurisdictional requirements for the writ of habeas corpus are entitled to a flexible interpretation:

> [T]he principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of proper jurisdiction, deal effectively with any and all forms of illegal restraint. *The rigidity which is appropriate to ordinary jurisdictional doctrine has not been applied to this writ.* (Emphasis added).

Price v. Johnston, 334 U.S. 266, 284 (1948). The foregoing statement was cited in *St. Clair v. Hiatt*, 83 F. Supp. 585, 586 (N.D. Ga. 1949), which was quoted with approval by the Sixth Circuit in *Davis v. Adult Parole Authority*, 610 F.2d 410, 413 (6th Cir. 1979).

It is now well-settled that the requirement of 28 U.S.C. §2241 that a habeas corpus petitioner be "in custody" does not restrict the writ to situations where a petitioner is physically confined, but includes any situation where the liberty of a petitioner has been wrongfully restrained. *See Jones v. Cunningham,* 371 U.S. 236 (1963) (history of writ reviewed and cases collected). Indeed, any legislative attempt to restrict the availability of habeas corpus would likely run afoul of Article I, Section 9 of the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

The central issue raised by this petition is whether revocation of petitioner's teaching certificate and consequent deprivation of his livelihood, together with the burden of collateral disabilities associated with a felony conviction, constitute a restraint of liberty sufficient to invoke federal jurisdiction for the purpose of considering his petition for habeas corpus.

Citing *Ward v. Knoblock,* 738 F.2d 134 (6th Cir. 1984), the Sixth Circuit affirmed the judgment of the District Court denying the writ, holding that the revocation of petitioner's "teaching certificate was a 'collateral consequence' of his conviction and went only to the issue of 'mootness', not to the relevant issue of 'jurisdiction' ". *Yoder v. Celebrezze* (September 8, 1988), C.A. 6 No. 87-4094, unreported.

In *Ward v. Knoblock, supra,* the Sixth Circuit held that a petitioner who has fully served his sentence may not rely *solely* on the usual collateral disabilities stemming from a felony conviction to satisfy the "in custody" prerequisite for federal habeas corpus jurisdiction. Petitioner in the instant appeal does not rely

on the usual collateral disabilities for the invocation of federal jurisdiction; rather, petitioner alleges that he has suffered, and still suffers, from a special and distinct restraint of liberty by reason of his loss of teaching certificate and livelihood. The rule in the Sixth Circuit is as follows:

> Although it is clear that actual physical custody in a penal institution is not required to confer habeas jurisdiction, there must be some significant restraint by the state on the petitioner's liberty in order for the action to lie. We hesitate to expand the right to apply for the writ to a case where it is undisputed that petitioner's liberty is not at all restrained by the state which imposed the sentence which he has served and now wishes to attack.

Id. at 138.

In the case at bar, it is *not* "undisputed that petitioner's liberty is not at all restrained by the state". To the contrary, petitioner alleges that he has been deprived of the freedom to engage in the profession for which he has trained and undergone licensing, and that such significant restraint of his liberty is *de facto* part of the sentence which he received.

Ohio Revised Code §3319.31(A) mandates revocation of a teaching certificate when the holder is found guilty of, *inter alia*, conduct which is immoral or unbecoming to his position. Further,

> (B) Whenever any person holding a valid teaching certificate . . . is convicted of any felony . . . the prosecutor in the case shall, on forms proscribed and furnished by the state board of education, promptly notify the state board of education of the person's name and residence address, the fact that the person pleaded guilty to or was convicted of such an offense, the section of the Revised Code violated, and the sentence of the court.

Ohio Revised Code §3319.31(B).

The foregoing section makes the prosecutor an agent of the state board of education for purposes of revoking a teaching certificate, and it is apparent that such revocation is a state-imposed restraint of liberty that is directly tied to certain (but not all) felony convictions. As such, it is *de facto* part of the sentence for such felony convictions. Although a separate revocation hearing is provided, in accordance with Chapter 119 of the *Ohio Revised Code* (the Ohio Administrative Procedure Act), the actual hearing is a *pro forma* event. Indeed, the decision of the hearing officer revoking petitioner's certificate shows that his action was non-discretionary and a direct consequence of petitioner's conviction:

> *Conclusion.* This hearing officer finds that Lester Yoder has been convicted of violating Revised Code §2907.03, a felony, and that his teaching certificate should be revoked pursuant to Revised Code §3319.31.

See Appendix D at A20.

The revocation of petitioner's teaching certificate and deprivation of his livelihood cannot fairly be characterized as insignificant restraints of liberty. They comport well with the description of restraints of liberty provided in *Jones v. Cunningham*, 371 U.S. 236, 240 (1963):

> History, usage, and precedent can leave us no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Similarly, the special restraints on liberty suffered by petitioner, *i.e.*, the loss of his teaching certificate and livelihood, are "restraints not shared by the public generally", and in fact are restraints not shared by other felons generally. The *Jones* Court continued, at 243:

> It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve the grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Although the instant petition does not rely solely on collateral disabilities—such as the loss of voting rights or the right to serve as a juror—to satisfy the "in custody" jurisdictional prerequisite, there is authority that such disabilities alone may be sufficient to invoke federal habeas corpus jurisdiction. In *Glover v. North Carolina*, 301 F. Supp. 364 (E.D. N.C. 1969), the court considered a petition for a writ of habeas corpus which was filed many years after petitioner had been discharged from state custody. The petitioner in *Glover* was not subject to any special, ongoing restraint of liberty as is the petitioner *sub judice*. Still, the court found that he was entitled to the benefit of habeas corpus, stating at 367:

> Although the petitioner in the present case did not file his application while he was serving the sentence which he attacks, he nonetheless will suffer disabilities and restraints on his liberty as a result of his having been convicted of seven felonies. The restraints will be just as real and substantial as those which were found to warrant an expansion of the availability of the writ in the recent cases previously discussed. He will not have the right to do many things that free men are entitled to do . . .

> [T]his court cannot make a valid distinction between the restraints on liberty that a parolee may experience and those that are experienced by one who has been convicted of a felony and subsequently unconditionally discharged . . . Should one experience a substantial restraint on his liberty as a result of a conviction that has been fully satisfied, his standing in habeas corpus should not hinge upon whether he is on parole, is eligible for parole, or has instituted his application while he was in physical custody even though unconditionally released before a final decision was rendered by the court.

Indeed, the "mootness" and "jurisdiction" issues do not provide a bright-line distinction of the "in custody" requirement. In *Carafas v. La Vallee,* 391 U.S. 234 (1968), this Court held that a petition for habeas corpus is not moot when a petitioner is unconditionally released from custody upon expiration of his sentence but before his claim is fully adjudicated where, in consequence of his conviction, he cannot serve as a labor union official, cannot vote in any state election, and cannot serve as a juror. Hence, "collateral disabilities" entitled petitioner to consideration on the merits. However, if there has been an *unconditional* release from custody before a petition is filed, there is no federal habeas corpus jurisdiction.

Because the revocation of petitioner's teaching certificate was an attendant factor in his conviction, it is asserted that the expiration of petitioner's probation (on May 16, 1987) did not entail an "unconditional release from custody". There is no question that the revocation of a state-issued teaching certificate and the denial of one's former profession are significant restraints of liberty. In construing the "liberty" protected by the Fifth and Fourteenth Amendments of the Constitution, this Court has stated that:

> [Liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (Emphasis aded).

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

In cases from other circuits where habeas corpus was denied on the basis of "jurisdiction", the collateral disabilities asserted by the petitioners were too tenuous to invoke the power of the writ. In *Furey v. Hyland*, 395 F. Supp. 1356 (D.C. N.J. 1975), *aff'd* 532 F.2d 746 (3d Cir. 1975), the court held that disabilities allegedly arising from a conviction for official corruption, most serious of which would be *possible* revocation of a license to practice medicine, do not by themselves satisfy the custody requirement of 28 U.S.C. §2241.

Likewise, in *Burnett v. Gladden*, 228 F. Supp. 527 (D.C. Cir. 1964), the Court held that a petitioner who had been *unconditionally* discharged and was not in custody at the time the writ was filed did not satisfy the jurisdictional requirements of 28 U.S.C. §2254 by showing that he *may* suffer greater penalties if convicted of other felonies in the future.

Finally, in *Morgan v. Juvenile Domestic Relations Court*, 491 F.2d 456 (4th Cir. 1974), the Fourth Circuit held that, where a federal habeas corpus petitioner is no longer imprisoned *and* alleges no collateral consequences placing his continued liberty in jeopardy, he is not entitled to habeas corpus relief.

It is undisputed that in this case petitioner's teaching certificate *was* revoked and that he *is* suffering a greater penalty beyond those "collateral disabilities" which go only to the issue of "mootness". The "in custody" requirement is satisfied by the "significant restraint by the state on the petitioner's liberty", *Ward v. Knoblock*, *supra*. This application still provides a workable barrier to prevent a deluge of frivolous petitions. To recognize and distinguish significant state action which perpetually impinges upon this petitioner's liberty does not render the custody requirement a nullity. Instead, it provides the opportunity for a unique petitioner to obtain review where he is subjected to a continuing, special restraint of liberty as a result of serious violations of his constitutional rights.

It is beyond cavil that the State of Ohio could not have revoked petitioner's teaching certificate without due process of law. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment").

The fact that petitioner received a due process hearing recognizes that the subsequent revocation of his teaching certificate (and inevitable deprivation of his livelihood) represents a restraint of liberty sufficient to trigger due process. It cannot now be seriously postulated that such a restraint of liberty is sufficient to require due process, but is too insignificant to allow this Court to grant jurisdiction for the purpose of reviewing

petitioner's allegations that the felony conviction underlying such restraint of liberty was obtained in violation of other important constitutional guarantees.

As noted by this Court in *Hensley, supra*, habeas corpus is an extraordinary remedy whose use is limited to cases of special urgency. In this case, the restraint imposed on petitioner's liberty is both immediate and severe; this restraint could not be resolved by more conventional remedies.

CONCLUSION

The Court of Appeals for the Sixth Circuit based its decision entirely upon a narrow and perhaps inconsistent interpretation of *Ward v. Knoblock, supra.* The decision in *Ward v. Knoblock* simply does not bar relief from this petitioner. Petitioner does *not* rely *solely* on the usual collateral disabilities stemming from a felony conviction. In fact, petitioner does not rely *at all* on *any* of the usual collateral disabilities. In addition, the Court of Appeals opinion below would appear to be in contravention of this Court's holding in *Jones v. Cunningham, supra.* A fair reading of *Jones* and the other cases cited herein compels the conclusion that petitioner was "in custody" within the meaning of 28 U.S.C. §2241 for federal habeas corpus jurisdiction. Therefore, the opinion of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 8, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 87-4094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER YODER,
Petitioner-Appellant,

v.

ANTHONY J. CELEBREZZE, JR., Attorney General of the State of Ohio,
Respondent-Appellee.

BEFORE: JONES and RYAN, *Circuit Judges*; and HULL, *Chief District Judge.**

PER CURIAM. Lester Yoder, the petitioner-appellant, appeals from the district court's judgment denying his petition for a writ of habeas corpus.

---

* Honorable Thomas G. Hull, United States District Court for the Eastern District of Tennessee, sitting by designation.

On March 19, 1985, Yoder was convicted, in the Common Pleas Court of Wayne County, Ohio, of one count of sexual battery as that offense is defined by Ohio Revised Code ("O.R.C.") section 2907.03(A)(6).

On May 16, 1985, the trial court sentenced Yoder to a prison term of one and one-half years. This term, however, was suspended and Yoder was placed on probation for two years. Thus, Yoder's probationary period ended May 16, 1987.

Furthermore, as a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.

Yoder appealed his conviction to both the state court of appeals and the state supreme court. On February 5, 1986, the court of appeals affirmed his conviction and on May 14, 1986, the supreme court overruled his motion for leave to appeal.

Thereafter, on July 30, 1987, Yoder filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 (1982), in the United States District Court for the Northern District of Ohio. Yoder alleged four grounds for relief, including claims relating to assistance of counsel and procedural due process. His petition was originally referred to a magistrate who recommended that it be dismissed for lack of jurisdiction since there had not

been a showing that Yoder was in the "custody" of the state of Ohio; a requirement of the statute under which he was proceeding.

Yoder timely filed objections to the magistrate's report, contending that the district court had jurisdiction because although his suspended sentence and probation period expired prior to the filing of his habeas corpus petition, the revocation of his teaching certificate constituted a restraint of liberty sufficient to satisfy the "in custody" requirement of §2254.

On October 29, 1987, the district court issued its opinion holding that it lacked jurisdiction to grant Yoder any relief. The court held that under *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the revocation of Yoder's teaching certificate was a "collateral consequence" of his conviction and went only to the issue of "mootness," not to the relevant issue of "jurisdiction." Thus, Yoder's petition was dismissed. On November 25, 1987, the court issued a certificate of probable cause and this appeal was timely filed immediately thereafter.

Because we find no reason to disturb the district court's judgment, but instead find it to be based upon the applicable law, that judgment, in its entirety, is hereby AFFIRMED.

APPENDIX B

MEMORANDUM OPINION AND JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Filed October 29, 1987)

Case No. C87-1966A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,
Petitioner,

vs.

ANTHONY J. CELEBREZZE, JR.,
Attorney General,
Respondent.

MEMORANDUM OPINION

DOWD, *J.*

In the above-captioned action for habeas corpus relief, the Court has before it the report and recommendation of Magistrate Charles R. Laurie. The Magistrate recommends that the petition be dismissed for lack of jurisdiction. The petitioner has timely filed objections to the Magistrate's report and recommendation. For the reasons that follow, the Court adopts the result recommended by the Magistrate and dismisses the petition.

On March 19, 1985, the petitioner Lester Yoder was convicted in the Common Pleas Court of Wayne County, Ohio, of felonious sexual battery under Ohio Rev. Code §2907.03(A)(6). On May 16, 1985, he received a one and one half year suspended sentence and was placed on two years probation. In addition, because of his felony conviction, Mr. Yoder's teaching certificate was revoked and he lost his rights to vote, to serve as a juror, and to hold public office. *See* Ohio Rev. Code §§3319.31 and 2961.01.

The petitioner duly exhausted his state appellate remedies, with the Supreme Court of Ohio overruling his motion for leave to appeal on May 14, 1986. On July 30, 1987, more than two months after his two-year probation period had ended, Mr. Yoder filed the above-captioned action for habeas corpus relief.

The Magistrate has recommended that the petition be dismissed because the petitioner was not in custody at the time the petition was filed, and also because the petition does not indicate any continuing collateral disability. The Magistrate has concluded that the Court is without jurisdiction to entertain the habeas corpus petition. In his objection to the Magistrate's report and recommendation, the petitioner asserts that the Court does indeed have jurisdiction to grant habeas corpus relief. The petitioner claims that he is "in custody" for habeas corpus purposes because he suffers a "continuing collateral disability" as a consequence of his state court conviction. In so asserting, the petitioner points to the fact that his teaching certificate has been revoked and also to the fact that he has lost his rights to vote, serve as a juror, and hold public office. It appears the petitioner has confused the distinguishable concepts of

jurisdiction and mootness and the Court must disagree with the petitioner's assertion that the Court has jurisdiction over his petition.

Under the provisions of 28 U.S.C. §2254, a person held unlawfully in state custody may petition a federal district court for habeas corpus relief. For federal jurisdiction to exist, however, the petitioner must be "in custody," either actual or constructive, at the time the petition is filed. *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984) *cert. denied*, 469 U.S. 1183 (1985); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

It sometimes happens that a person is released from custody subsequent to the filing of the habeas corpus petition, but while the action is still pending. In such a situation, a question of mootness then arises. Depending on the circumstances, a petitioner's release from custody will not necessarily moot his petition. For example, if the petitioner suffers from a "continuing collateral disability as a result of his conviction, his release from custody will not moot his petition." *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968); *Ward v. Knoblock, supra.*

The question of mootness, however, does not arise unless the federal court acquires jurisdiction at the outset to entertain the habeas corpus petition. Where, as in this case, a petitioner is not "in custody" when he files his petition, federal jurisdiction never attaches and the petition must be dismissed. The Sixth Circuit Court of Appeals has explained the distinction between the mootness concept and jurisdiction concept as follows:

> That argument [of continuing collateral disabilities], however, goes to mootness and not to what is necessary for federal court jurisdiction under section 2254. The existence of collateral consequences of his conviction may enable a petitioner who has fully

> served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless ... federal jurisdiction has already attached. *Ward v. Knoblock, supra*, 738 F.2d at 138 (distinguishing *Carafas v. LaVallee, supra*, where custody ended after federal jurisdiction had already attached).

In summary, in the present case Lester Yoder's term of probation ended in May of 1985. Thus, when he filed his petition on July 30, 1985, he was not in custody. Therefore, federal jurisdiction never attached, and the petition must be dismissed, regardless of any continuing collateral disability suffered by the petitioner. Accordingly, the above-captioned action is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

Case No. C87-1966A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,
Petitioner,

vs.

ANTHONY J. CELEBREZZE, JR.,
Attorney General,
Respondent.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above-captioned action is dismissed.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

APPENDIX C

REPORT AND RECOMMENDATION OF THE MAGISTRATE

(Filed August 12, 1987)

Civil Action No. C87-1966-A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,
Petitioner,

vs.

ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL,
Respondent.

REPORT AND RECOMMENDATION
OF MAGISTRATE

LAURIE, *M.*

Petitioner, Lester Yoder, was convicted on March 19, 1985 in the Common Pleas Court of Wayne County, Ohio on one count of sexual battery in violation of Ohio Revised Code section 2907.03(A)(b). A presentence investigation followed, and on May 16, 1985 Petitioner was sentenced to a one and one-half years suspended sentence and placed on two years probation. (Petitioner's Exhibits "C" and "D"). Appeals to the state court of appeals and Ohio Supreme Court were taken.

The present action for federal habeas corpus relief was filed on July 30, 1987 and referred by United States District Judge David D. Dowd, Jr. to this Magistrate on August 11, 1987 for supervision and preparation of a report and recommended disposition. Due to the fact that Petitioner is no longer in custody, this Magistrate recommends that this case be dismissed.

Petitioner's habeas corpus action is based on 28 U.S.C. §2254 which provides remedies in federal courts for unlawful state custody. This naturally requires an individual to be "in custody" for there to be federal jurisdiction. *Ward v. Judge Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1183 (1985). Individuals on parole, probation, or bail may be "in custody" for the purpose of habeas corpus review. *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984). Whereas, an individual who is neither in actual or constructive custody and who does not indicate any continuing collateral disability or consequence of the conviction is not entitled to habeas corpus relief. *Steinberg v. Police Court of Albany, N.Y.*, 610 F.2d 449, 453 (6th Cir. 1979); *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968) (mootness); *Harts v. State of Indiana*, 732 F.2d 95 (7th Cir. 1984). Thus, when an individual is not in custody at the time the petition is filed, federal habeas corpus relief is unavailable. *Ward v. Judge Knoblock, supra; Sevier v. Turner, supra; compare, Carafas v. LaVallee, supra* (custody ended during course of judicial review).

Petitioner has shown only that his period of probation had ended in May, 1987 which was prior to the time of filing of this action. The petition lists no other place or type of confinement. Nor does the petition indicate any continuing collateral disability. Consequently, this Magistrate respectfully recommends

that the Court dismiss the instant petition because it is without jurisdiction as the relief sought is unavailable to one not in custody at the time of filing the petition.

/s/ CHARLES R. LAURIE
United States Magistrate

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to Office of Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43266, and to Stephen Walker, 1340 Sumner Court, Cleveland, Ohio 44115, this 12th day of August, 1987, by regular United States Mail.

/s/ CHARLES R. LAURIE
United States Magistrate

APPENDIX D

OBJECTIONS TO THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE

(Filed August 19, 1987)

Case No. C87-1966-A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,
Petitioner,

vs.

ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL,
Respondent.

OBJECTIONS TO THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE

Petitioner objects to the Report and Recommendations of the Magistrate primarily because this Court does have jurisdiction to grant the relief sought as petitioner is "in custody" within the meaning of federal Habeas Corpus review. Petitioner does suffer a continuing collateral disability as a consequence of his state court conviction.

> Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.

Fiswick v. United States, 329 U.S. 211, 230 (1946); *see also Carafas v. LaVallee*, 391 U.S. 234 (1968); and *Steinberg v. Police Court of Albany, N.Y.*, 610 F.2d 449 (6th Cir. 1979).

First, as a convicted felon in Ohio, petitioner has been disenfranchised from serving as a juror or holding public office, *Ohio Revised Code* §2961.01 (Appendix "A").

Second, as a convicted felon in Ohio, petitioner's teaching certificate has been revoked (See Appendix "B") pursuant to *Ohio Revised Code* §3319.31 (See Appendix "C").

These factors alone permit this Court to exercise jurisdiction in this cause and evaluate petitioner's claims on the merits. For that reason, petitioner prays that the Court enter an order finding petitioner's objections to be well-taken.

Respectfully submitted,

/s/ STEPHEN WALKER
The Brownell Building
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been forwarded to the Office of the Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43266, this 19th day of August, 1987, by regular U.S. mail.

/s/ STEPHEN WALKER
Attorney for Petitioner

APPENDIX "A"

2961.01 Civil rights of convicted felons

A person convicted of a felony under the laws of this or any other state or the United States, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. When any such person is granted probation, parole, or a conditional pardon, he is competent to be an elector during the period of probation or parole or until the conditions of his pardon have been performed or have transpired, and thereafter following his final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of his conviction in this state, unless so specified.

APPENDIX "B"

13. RESOLUTION TO RESCIND AN EARLIER RESOLUTION AND TO ADOPT ANEW A RESOLUTION OF INTENT TO CONSIDER THE SUSPENSION AND POSSIBLE REVOCATION OF THE TEACHER CERTIFICATES OF LESTER S. YODER.

I RECOMMEND that the State Board of Education ADOPT the following Resolution:

WHEREAS the State Board of Education has adopted standards for teacher certification in the state of Ohio as provided for by law; and

WHEREAS a Four-Year Special Education Certification (205-26-2647), effective July 1, 1984, has been issued to Lester S. Yoder; and

WHEREAS said certificated individual has been found guilty of violating Section 2907-03, Revised Code, a felony, by the Wayne County Court of Common Pleas; and

WHEREAS Section 3319.31, Revised Code, requires the prosecutor of certain convictions involving certificated persons to promptly notify the State Board of Education; and

WHEREAS the State Board of Education has been notified of such a conviction; and

WHEREAS the State Board of Education adopted a resolution on May 13, 1985, of its intent to consider the suspension and possible revocation of the teaching certificates of Lester S. Yoder; and

WHEREAS a Chapter 119 hearing requested by Lester S. Yoder convened on July 29, 1985, to take testimony in this matter; and

WHEREAS technical defects in the procedures were identified at that time relating to the court documents and the timing of the State Board of Education Resolution; and

WHEREAS the hearing was adjourned to perfect the procedure: Therefore, Be It

RESOLVED, That the State Board of Education resolution adopted May 13, 1985, relative to Lester S. Yoder be rescinded; and, Be It

FURTHER RESOLVED, That the Superintendent of Public Instruction be, and he hereby is, directed to notify Lester S. Yoder of the State Board of Education's intent to consider the suspension and possible revocation of any and all teacher certificates of said Lester S. Yoder and to notify said individual of the right to a hearing pursuant to Chapter 119, Revised Code; and, Be It

FURTHER RESOLVED, That the Superintendent of Public Instruction be, and he hereby is, directed to appoint a referee, establish the date, time and place, and give notice of a hearing on said matter, should one be requested, pursuant to the provisions of Chapter 119, Revised Code.

It was moved by Mr. Brickner and seconded by Mr. Price that the above recommendation be approved. The President called for a voice vote on the motion. Motion carried.

I Certify that the above is a true and correct copy of the action taken by the State Board of Education at its meeting on September 9, 1985.

/s/ FRANKLIN B. WALTER
FRANKLIN B. WALTER

Columbus, Ohio
September 10, 1985

APPENDIX "B-1"

[RECEIVED DEC 22 1986
DEPARTMENT OF EDUCATION]

STATE BOARD OF EDUCATION
COLUMBUS, OHIO

IN RE:

The Matter Of The Teaching Certificate Of Lester Yoder

DECISION

GEORGE E. LORD, *Hearing Examiner*

This matter came on for hearing as provided in Chapter 119.01, et seq., of the *Revised Code* at the request of Mr. Lester Yoder, a certified teacher licensed by the Ohio State Board of Education. On September 11, 1985, the Superintendant of Public Instruction, Franklin B. Walter, notified Mr. Yoder by letter that the State Board of Education had adopted a resolution of its intent to consider the suspension and possible revocation of Lester Yoder's teacher certificates. Mr. Yoder requested a due process hearing which was held February 24, 1986, before this hearing examiner.

The hearing began with Mr. Yoder's attorney, Mr. Stephen Walker, moving to dismiss the entire proceeding based on double jeopardy, *res judicata* and the inpropriety of this hearing examiner to sit in this hearing. Mr. Walker founded his motions on the fact that the State Board of Education had adopted a similar resolution of intent to suspend or revoke Mr. Yoder's teaching certificates based on the Board's conclusion that he had been convicted of committing sexual battery, a felony. That resolution came on for hearing on July 29, 1985, before this same hearing officer. At that hearing, Mr. Walker moved to dismiss the matter after the State

Board had presented its case and rested based on the fact that the Board had adopted its resolution before Mr. Yoder's conviction had actually been finalized by Court journal. In response to that motion, the State Board dismissed its case *sua sponte* and withdrew all matters from consideration.

In the instant hearing, the State Board presented the appropriate administrative correspondence along with the final judgment entry of the Wayne County Common Pleas Court reflecting that Lester Yoder was, in fact, convicted of violating Revised Code #2907.03(A)(6), a felony, and sentenced therefor on May 21, 1985.

Since Mr. Yoder's conviction of a Felony is not at issue here, the only question to be decided is the propriety of this second hearing. In consideration of the issues raised by Mr. Yoder's attorney, this hearing officer finds that the defense of double jeopardy is only available in criminal prosecutions and this matter is clearly civil in nature. As to the question of *res judicata*, the question before this hearing officer has never been litigated to fruition. While there had been another hearing on the same issue of Mr. Yoder's conviction, that matter was never resolved on the merits so *res judicata* does not apply. As to the question of the propriety of this hearing officer sitting for both hearings, Mr. Yoder's attorney presented no evidence of bias or prejudice and, therefore, no inpropriety was shown.

Conclusion

This hearing officer finds that Lester Yoder has been convicted of violating Revised Code #2907.03, a felony, and that his teaching certificate should be revoked pursuant to Revised Code #3319.31.

/s/ GEORGE E. LORD
George E. Lord
Hearing Officer

APPENDIX "C"

3319.31 Revocation of certificate

(A) If at any time the holder of a certificate is found intemperate, immoral, incompetent, negligent, or guilty of other conduct unbecoming to his position, the state board of education shall revoke the certificate, unless the finding is based upon a conviction of which the state board of education was notified under division (B) of this section. If the finding is based upon such a conviction, the state board of education initially shall suspend the person's certificate, with the final disposition of the certificate to be governed by this division. If the person whose certificate was suspended does not appeal the conviction upon which the suspension is based, or if he appeals the conviction and the conviction is upheld on appeal and no subsequent appeal is taken, the state board of education shall revoke the certificate. The state board of education shall not revoke a certificate that has been suspended pursuant to this division during the pendency of any appeal of the conviction or at any time prior to the expiration of the applicable period for the filing of a notice of appeal relative to the conviction. If the person whose certificate was suspended appeals the conviction upon which the suspension is based, and the conviction is reversed on appeal the person's certificate shall be reinstated. The evidence upon which a finding under this division is based shall be presented in writing, of which the accused shall be notified, and no certificate shall be suspended or revoked without a personal hearing in accordance with Chapter 119 of the Revised Code.

(B) Whenever any person holding a valid teaching certificate issued pursuant to sections 3319.22 to 3319.31 of the Revised Code pleads guilty to or is convicted of

any felony, any violation of section 2907.04 or 2907.06, or division (A) or (C) of section 2907.07 of the Revised Code, any offense of violence, theft offense, or drug abuse offense that is not a minor misdemeanor, or any substantively comparable ordinance of a municipal corporation, the prosecutor in the case shall, on forms prescribed and furnished by the state board of education, promptly notify the state board of education and any employing board of education of the person's name and residence address, the fact that the person pleaded guilty to or was convicted of such an offense, the section of the Revised Code violated, and the sentence of the court.

As used in this section, "theft offense" has the same meaning as in section 2913.01 of the Revised Code, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code, and "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

FILED
MAR 4: 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-761

In The
Supreme Court of the United States

OCTOBER TERM, 1988

LESTER YODER,

Petitioner,

v.

ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL OF THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Assistant Attorney General
Chief, Federal Litigation Section
(Counsel of Record)

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether a habeas corpus petitioner whose teaching certificate has been revoked as a result of a criminal conviction is "in custody" for the purpose of habeas corpus jurisdiction under 28 U.S.C. Section 2254.

PARTIES

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, the parties to the proceeding are listed in the caption of the case. Petitioner is Lester Yoder. Respondent is Anthony J. Celebrezze, Jr., Attorney General of the State of Ohio.

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OPINIONS BELOW

The September 8, 1988 decision of the United States Court of Appeals for the Sixth Circuit in *Yoder v. Celebrezze*, Case No. 87-4094, is unpublished and unreported (A-1). The October 29, 1987 decision of the United States District Court for the Northern District of Ohio, Eastern Division in *Yoder v. Celebrezze*, Case No. C87-1966A is unpublished and unreported (A-4). The report and recommendation of the United States Magistrate is unpublished and unreported (A-7). The order of the Supreme Court of Ohio is unpublished and unreported (A-10). The decision of the Ohio Court of Appeals for Summit County is unpublished and unreported (A-11). The journal entry of sentence of the Court of Common Pleas of Wayne County, Ohio, is unpublished and unreported (A-19). All are reproduced in their entirety in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 8, 1988. The petition was filed within ninety days of the judgment. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. Section 2241 which provides in part:

* * *

> (c) The writ of habeas corpus shall not extend to a prisoner unless -
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > (2) He is in custody for an act done or omitted

> in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;
>
> * * *

This case also invloves 28 U.S.C. Section 2254 which provides in part:

> * * *
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *

STATEMENT OF THE CASE

The facts which led to the conviction of Petitioner Lester Yoder (hereinafter "Yoder") are summarized in the decision of the Court of Appeals of Ohio:

> Defendant was a teacher at the Apple Creek Developmental Center (ACDC). He was indicted on a single count of the sexual battery of Eugene Jannie, a resident of the center. Yoder was tried to the court and convicted.
>
> * * *
>
> The evidence shows that defendant brought Eugene Jannie to his home. The two men were alone and Yoder took Jannie into a bedroom. Jannie's statement to Ona Jackson reveals that he and Yoder kissed on the mouth and engaged in oral sex. Yoder's own statement to ACDC officials was that he was sexually aroused.

(A-16).

On March 19, 1985, Yoder was convicted by the Court of Common Pleas of Wayne County, Ohio, on one count of sexual battery as defined in section 2907.03(A)(6) of the Ohio Revised Code. (A-19). Thereafter, the trial court sentenced Yoder to a term of one-and-one-half (1 1/2) years imprisonment. (*Id*). This term was suspended and Yoder was placed on probation for two (2) years. (*Id*). Yoder's probationary period ended May 16, 1987. (A-1).

Yoder appealed the decision of the trial court to the Court of Appeals of Ohio and to the Ohio Supreme Court. The state appellate court affirmed the decision of the trial court. (A-11). The Ohio Supreme Court overruled Yoder's motion for leave to appeal. (A-10). The Sixth Circuit Court of Appeals, in its decision, summarized the facts of Yoder's teaching certificate revocation:

> [A]s a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.

(A-2).

On July 30, 1987, Yoder filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division. The petition, filed pursuant to 28 U.S.C. Section 2254, contained the following grounds for relief:

1. The failure of the state to provide a bill of particulars upon a seasonably written request (1) denied the accused due process of law and (2) left the indictment fatally defective.

2. Due process is denied an accused where his conviction rests solely upon testimony erroneously admitted into evidence.

3. The rendering of a verdict by the court in a non-jury criminal trial without hearing final arguments denies an accused 'assistance of counsel' as guaranteed in the Sixth and Fourteenth Amendments and Article I, Section 10 of the Ohio Constitution.

4. Due process is denied an accused where the conviction rests upon evidence insufficient as a matter of law and/or is manifestly against the weight of the evidence.

On August 12, 1987, United States Magistrate Charles R. Laurie filed a report and recommendation with the District Court in which he recommended dismissal of the petition on the ground that the court "is without jurisdiction as the relief sought is unavailable to one not in custody at the time of filing the petition." (A-8). On October 29, 1987, District Court Judge David D. Dowd, Jr. dismissed the petition. (A-4). Yoder appealed to the United States Court of Appeals for the Sixth Circuit. On September 8, 1988, the Court of Appeals affirmed the judgment of the District Court. (A-1).

ARGUMENT AGAINST GRANTING CERTIORARI

THE REVOCATION OF A TEACHING CERTIFICATE AS A RESULT OF A CRIMINAL CONVICTION DOES NOT SATISFY THE "IN CUSTODY" REQUIREMENT OF 28 U.S.C. SECTION 2254 FOR THE ATTACHMENT OF FEDERAL HABEAS CORPUS JURISDICTION.

A federal District Court has jurisdiction over the habeas corpus petition of a petitioner convicted in state court only if he can show that:

> (1) He is *in custody* under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is *in custody* for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States; * * *

28 U.S.C. Section 2241(c). (Emphasis added).

In addition, 28 U.S.C. Section 2254 sets forth the requirements that:

> [T]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. Section 2254(a). (Emphasis added).

The federal courts have interpreted the "in custody"

language of the statutes to require restraint on a petitioner's liberty:

> Although it is clear that actual physical custody in a penal institution is not required to confer habeas jurisdiction, there must be some significant restraint by the state on the petitioner's liberty in order for the action to lie. We hesitate to expand the right to apply for the writ to a case where it is undisputed that petitioner's liberty is not at all restrained by the state which imposed the sentence which he has served and now wishes to attack.

Ward v. Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1183 (1985). The definition of "custody" has been expanded to include "persons on parole, probation or bail." *Sevier v. Turner*, 742 F.2d 262, 269 (6th Cir. 1984). However, fines or civil money judgments have been held not to constitute "custody." *Id.*

For a federal court to acquire jurisdiction to entertain a habeas corpus petition, the petitioner must be "in custody" at the time the petition is filed. If a habeas corpus petition has been filed while the petitioner was in custody, and jurisdiction in the federal court has attached, the subsequent release of the petitioner will not moot the case if there is a continuing collateral disability that resulted from the conviction under attack. *Carafas v. LaVallee*, 391 U.S. 234, 237-240 (1968). However, this is true only if the jurisdictional custody requirement has been met already — at the time the petition was filed. *Id.* at 236. Thus, the argument of continuing collateral disabilities:

> . . . goes to mootness and not to what is necessary for federal court jurisdiction under section 2254. The existence of collateral consequences of his conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless . . . federal jurisdiction has

already attached.

Ward v. Knoblock, 738 F.2d at 138-139.

Yoder's probation ended on May 16, 1987. He filed his habeas corpus petition on July 30, 1987. This was over two months after his final release from state custody. Thus, Yoder was not "in custody" in July, 1987. Any argument that a continuing collateral disability existed at the time of filing the habeas petition is relevant only to defeat mootness after initial jurisdiction attached at the time of the filing of the petition. Collateral consequences will not meet the definition of custody, and will not give the federal courts jurisdiction in habeas corpus.

Yoder appears to recognize that collateral consequences will not meet the "in custody" requirement. He argues in his petition to this Court that he is not attempting to utilize the continuing collateral consequences theory, by itself, to prove that jurisdiction exists. *See* Petition for Writ of Certiorari, at p.17. Rather, he seeks to broaden the definition of "in custody" to include the revocation of a teaching certificate. He relies specifically on *Jones v. Cunningham*, 371 U.S. 236 (1963) and on *Glover v. North Carolina*, 301 F.Supp. 364 (E.D. N.C. 1969).

In *Jones*, this Court held that the petition of a petitioner released from physical imprisonment did not become moot because the petitioner was under the custody and control of the parole board which imposed numerous conditions that significantly restrained his freedom. 371 U.S. at 243. In *Glover*, the District Court extended the concept of custody in order to confer jurisdiction over a petition even though the petitioner had obtained a final release from his sentence. The District Court held that the unspecified disabilties flowing from a felony conviction were sufficient to confer standing to a petitioner to challenge his conviction in habeas corpus. *Glover*, 301 F.Supp. at 367-368. Respondent has found no reported decision following the holding of *Glover* and expanding the "in custody" requirement to encompass collateral consequences. *See Welch v. Falke*, 507 F.Supp.

264, 266 (S.D. Ohio 1980) (noting that the court therein could find no appeal and no cases following *Glover*). Moreover, in *Harvey v. South Dakota,* 526 F.2d 840 (8th Cir. 1975), *cert. denied,* 426 U.S. 911 (1976), the Eighth Circuit rejected the argument that the disability from pursuing certain professions constituted custody for habeas corpus purposes. *See also Holt v. Commonwealth of Virginia,* 567 F.Supp. 210, 213 n.1 (W.D. Va. 1983).

Meyer v. Nebraska, 262 U.S. 390 (1923), also cited by Yoder in his petition, is not a habeas corpus case. That case overturned as unconstitutional a Nebraska law forbidding the teaching of any language but English.[1] Clearly, no such unconstitutional law is involved here.

Yoder asks this Court to expand the scope of the "in custody" requirement in the federal habeas corpus statutes to include every kind of collateral disability. This Court, and the other federal courts, have included actual incarceration, bond, parole and probation in the definition of custody. However, this Court and the circuit courts have appropriately refrained from further expanding the definition, and should refrain at this time as well. The custody requirement is intended to preserve the remedy of habeas corpus for severe and immediate restraints on liberty. *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973). The disqualification of a convicted felon from engaging in a certain profession is not such a severe and immediate restraint as to constitute custody for the purpose of habeas corpus.

---

[1] This law was aimed at or enforced primarily against German speaking people in a period just after the First World War.

CONCLUSION

The issue raised by Yoder does not merit review by this Court and the Respondent asks this Court to deny the writ of certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Assistant Attorney General
Chief, Federal Litigation Section
(Counsel of Record)

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ATTORNEYS FOR RESPONDENT

February 27, 1989

APPENDIX

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No. 87-4094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER YODER,	:	
Petitioner-Appellant,	:	
v.	:	**ON APPEAL FROM THE UNITED STATES**
ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL OF THE STATE OF OHIO,	:	**DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**
Respondent-Appellee.	:	(Filed September 8, 1988)

BEFORE: **JONES and RYAN,** Circuit Judges; and **HULL,** Chief District Judge.*

Per Curiam. Lester Yoder, the petitioner-appellant, appeals from the district court's judgment denying his petition for a writ of habeas corpus.

On March 19, 1985, Yoder was convicted, in the Common Pleas Court of Wayne County, Ohio, of one count of sexual battery as that offense is defined by Ohio Revised Code ("O.R.C.") section 2907.03(A)(6).

On May 16, 1985, the trial court sentenced Yoder to a prison term of one and one-half years. This term, however, was suspended and Yoder was placed on probation for two years. Thus, Yoder's probationary period ended May 16, 1987.

---

* Honorable Thomas G. Hull, United States District Court for the Eastern Division of Tennessee, sitting by designation.

Furthermore, as a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.

Yoder appealed his conviction to both the state court of appeals and the state supreme court. On February 5, 1986, the court of appeals affirmed his conviction and on May 14, 1986, the supreme court overruled his motion for leave to appeal.

Thereafter, on July 30, 1987, Yoder filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 (1982), in the United States District Court for the Northern District of Ohio. Yoder alleged four grounds for relief, including claims relating to assistance of counsel and procedural due process. His petition was originally referred to a magistrate who recommended that it be dismissed for lack of jurisdiction since there had not been a showing that Yoder was in the "custody" of the state of Ohio; a requirement of the statute under which he was proceeding.

Yoder timely filed objections to the magistrate's report, contending that the district court had jurisdiction because although his suspended sentence and probation period expired prior to the filing of his habeas corpus petition, the revocation of his teaching certificate constituted a restraint of liberty sufficient to satisfy the "in custody" requirement of §2254.

On October 29, 1987, the district court issued its opinion holding that it lacked jurisdiction to grant Yoder any relief. The court held that under *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the revocation of Yoder's teaching certificate was a "collateral

consequence" of his conviction and went only to the issue of "mootness," not to the relevant issue of "jurisdiction." Thus, Yoder's petition was dismissed. On November 25, 1987, the court issued a certificate of probable cause and this appeal was timely filed immediately thereafter.

Because we find no reason to disturb the district court's judgment, but instead find it to be based upon the applicable law, that judgment, in its entirety, is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Lester Yoder,	)	
	)	
Petitioner,	)	CASE NO. C87-1966A
	)	
vs.	)	
	)	
Anthony J. Celebrezze, Jr.,	)	
Attorney General,	)	MEMORANDUM OPINION
	)	
Respondent.	)	

(Filed October 29, 1987)

Dowd, J.

In the above-captioned action for habeas corpus relief, the Court has before it the report and recommendation of Magistrate Charles R. Laurie. The Magistrate recommends that the petition be dismissed for lack of jurisdiction. The petitioner has timely filed objections to the Magistrate's report and recommendation. For the reasons that follow, the Court adopts the result recommended by the Magistrate and dismisses the petition.

On March 19, 1985, the petitioner Lester Yoder was convicted in the Common Pleas Court of Wayne County, Ohio, of felonious sexual battery under Ohio Rev. Code §2907.03(A)(6). On May 16, 1985, he received a one and one half year suspended sentence and was placed on two years probation. In addition, because of his felony conviction, Mr. Yoder's teaching certificate was revoked and he lost his rights to vote, to serve as a juror, and to hold public office. See Ohio Rev. Code §§3319.31 and 2961.01.

The petitioner duly exhausted his state appellate remedies, with the Supreme Court of Ohio overruling his motion for leave to appeal on May 14, 1986. On July 30, 1987, more

than two months after his two-year probation period had ended, Mr. Yoder filed the above-captioned action for habeas corpus relief.

The Magistrate has recommended that the petition be dismissed because the petitioner was not in custody at the time the petition was filed, and also because the petition does not indicate any continuing collateral disability. The Magistrate has concluded that the Court is without jurisdiction to entertain the habeas corpus petition. In his objection to the Magistrate's report and recommendation, the petitioner asserts that the Court does indeed have jurisdiction to grant habeas corpus relief. The petitioner claims that he is "in custody" for habeas corpus purposes because he suffers a "continuing collateral disability" as a consequence of his state court conviction. In so asserting, the petitioner points to the fact that his teaching certificate has been revoked and also to the fact that he has lost his rights to vote, serve as a juror, and hold public office. It appears the petitioner has confused the distinguisable concepts of jurisdiction and mootness and the Court must disagree with the petitioner's assertion that the Court has jurisdiction over his petition.

Under the provisions of 28 U.S.C. §2254, a person held unlawfully in state custody may petition a federal district court for habeas corpus relief. For federal jurisdiction to exist, however, the petitioner must be "in custody," either actual or constructive, at the time the petition is filed. *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984) *cert. denied*, 469 U.S. 1183 (1985); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

It sometimes happens that a person is released from custody subsequent to the filing of the habeas corpus petition, but while the action is still pending. In such a situation, a question of mootness then arises. Depending on the circumstances, a petitioner's release from custody will not necessarily moot his petition. For example, if the petitioner suffers from a "continuing collateral disabliity as a result of his conviction, his release from custody will not moot his

petition." *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968); *Ward v. Knoblock, supra.*

The question of mootness, however, does not arise unless the federal court acquires jurisdiction at the outset to entertain the habeas corpus petition. Where, as in this case, a petitioner is not "in custody" when he files his petition, federal jurisdiction never attaches and the petition must be dismissed. The Sixth Circuit Court of Appeals has explained the distinction between the mootness concept and jurisdiction concept as follows:

> That argument [of continuing collateral disabilities], however, goes to mootness and not to what is necessary for federal court jurisdiction under section 2254. The existence of collateral consequences of his conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless . . . federal jurisdiction has already attached. *Ward v. Knoblock, supra,* 738 F.2d at 138 (distinguishing *Carafas v. LaVallee, supra,* where custody ended after federal jurisdiction had already attached).

In summary, in the present case Lester Yoder's term of probation ended in May of 1985. Thus, when he filed his petition on July 30, 1985, he was not in custody. Therefore, federal jurisdiction never attached, and the petition must be dismissed, regardless of any continuing collateral disability suffered by the petitioner. Accordingly, the above-captioned action is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.,
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,	)	Civil Action No. C87-1966-A
	)	
Petitioner,	)	Judge David D. Dowd, Jr.
	)	
vs.	)	REPORT AND
	)	RECOMMENDATION
ANTHONY J.	)	OF MAGISTRATE
CELEBREZZE, JR.,	)	
ATTORNEY GENERAL,	)	Magistrate
	)	Charles R. Laurie
Respondent.	)	

(Filed August 12, 1987)

Laurie, M.,

Petitioner, Lester Yoder, was convicted on March 19, 1985 in the Common Pleas Court of Wayne County, Ohio on one count of sexual battery in violation of Ohio Revised Code section 2907.03(A)(b). A presentence investigation followed, and on May 16, 1985 Petitioner was sentenced to a one and one-half years suspended sentence and placed on two years probation. (Petitioner's Exhibits "C" and "D"). Appeals to the state court of appeals and Ohio Supreme Court were taken.

The present action for federal habeas corpus relief was filed on July 30, 1987 and referred by United States District Judge David D. Dowd, Jr. to this Magistrate on August 11, 1987 for supervision and preparation of a report and recommended disposition. Due to the fact that Petitioner is no longer in custody, this Magistate recommends that this case be dismissed.

Petitioner's habeas corpus action is based on 28 U.S.C. §2254 which provides remedies in federal courts for unlawful state custody. This naturally requires an individual to be "in custody" for there to be federal jurisdiction. *Ward v. Judge*

Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1183 (1985). Individuals on parole, probation, or bail may be "in custody" for the purpose of habeas corpus review. *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984). Whereas, an individual who is neither in actual or constructive custody and who does not indicate any continuing collateral disability or consequence of the conviction is not entitled to habeas corpus relief. *Steinberg v. Police Court of Albany, N.Y.*, 610 F.2d 449, 453 (6th Cir. 1979); *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968) (mootness); *Harts v. State of Indiana*, 732 F.2d 95 (7th Cir 1984). Thus, when an individual is not in custody at the time the petition is filed, federal habeas corpus relief is unavailable. *Ward v. Judge Knoblock, supra; Sevier v. Turner, supra; compare, Carafas v. LaVallee, supra* (custody ended during course of judicial review).

Petitioner has shown only that his period of probation had ended in May, 1987 which was prior to the time of filing of this action. The petition lists no other place or type of confinement. Nor does the petition indicate any continuing collateral disability. Consequently, this Magistrate respectfully recommends that the Court dismiss the instant petition because it is without jurisdiction as the relief sought is unavailable to one not in custody at the time of filing the petition.

/s/ CHARLES R. LAURIE
United States Magistrate

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to Office of Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43266, and to Stephen Walker, 1340 Sumner Court, Cleveland, Ohio 44115, this 12th day of August, 1987, by regular United States Mail.

/s/ CHARLES R. LAURIE
United States Magistrate

IN THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: May 14, 1986

State of Ohio, Appellee,	:	Case No. 86-485
v.	:	ENTRY
Lester Yoder, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Wayne County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Stephen Walker.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY _____ CLERK

/s/DANIEL J. CROWLEY _____ DEPUTY

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	)	C.A. NO. 2099
	)	
Plaintiff-Appellee	)	
	)	APPEAL FROM JUDGMENT
v.	)	ENTERED IN THE
	)	COMMON PLEAS COURT
LESTER S. YODER	)	COUNTY OF WAYNE, OHIO
	)	CASE NO. 84 CR 111
Defendant-Appellant	)	

DECISION AND JOURNAL ENTRY

Dated: February 5, 1986

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, J.

This cause came on before the court upon defendant's appeal from his conviction of Sexual Battery in violation of R.C. 2907.03(A)(6). We affirm.

Defendant was a teacher at the Apple Creek Developmental Center (ACDC). He was indicted on a single count of the sexual battery of Eugene Jannie, a resident of the center. Yoder was tried to the court and convicted. He was sentenced to a determinate term of one and one-half years; the trial court suspended the sentence and placed Yoder on probation for two years. Yoder appeals.

ASSIGNMENT OF ERROR 1

"The failure of the state to provide a bill of particulars upon a seasonably written request (1) denied the accused due process of law, and (2)

left the indictment fatally defective."

In its indictment, the Grand Jury found that on July 19, 1984, in Wayne County, defendant

> "***engage[d] in sexual conduct with another, to wit: Eugene Jannie, not the spouse of the offender, and the said Eugene Jannie is a person in custody of law or a patient in a hospital or other institution, and said LESTER S. YODER had supervisory or disciplinary authority over Eugene Jannie,"

On August 23, 1984, defendant requested a Bill of Particulars. The prosecutor, on August 30, responded saying:

> "***the indictment in this matter is sufficient on its face to apprise the defendant of the nature of the charge against him."

Defendant pressed this issue no further, although he did continue to seek discovery of his statements and of other evidence. Generally, an appellate court will not consider an error which appellant's counsel could have called, but did not call, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. *State v. Williams* (1977), 51 Ohio St. 2d 112; *State v. DeRighter* (1945), 145 Ohio St. 552, 555.

Moreover, the record reveals that under the circumstances of this case, the indictment apprised defendant of the charge he faced with sufficient specificity. Prior to being indicted, Yoder was interrogated by ACDC staff, including a security officer. Yoder thereby was made aware that the nature of the sexual conduct involved was fellatio between Yoder and Jannie. The disjunctive language of the statute used in the indictment did not prevent him from preparing his defense.

Had Yoder been prosecuted for sexual conduct other than fellatio or in a capacity other than as one who had disciplinary authority over Jannie, his claim of surprise might stand. However, he was prosecuted for the same sexual conduct

as formed the basis of the ACDC investigation; he was prosecuted in his correct status: a person having supervisory authority over a patient in a state institution. The lack of a Bill of Particulars may deprive a defendant of the opportunity to prepare his defense if the defendant effectively is surprised by the charge on which he ultimately is tried. However, here, defendant has demonstrated no basis for a finding that he was denied the opportunity to prepare. *State v. Abernathy* (Sept. 1, 1982), Wayne App. No. 1808, unreported.

Defendant's first assignment of error is not well taken.

ASSIGNMENT OF ERROR II

> "The admission into evidence of (1) testimony as an excited utterance and (2) testimony as an expert opinion was prejudicial error."

EXCITED UTTERANCE

At trial, Ona Jackson, testified as to Eugene Jannie's statements about sexual conduct with Yoder. Defendant interposed his objection. The trial court permitted Jackson to testify pursuant to Evid. R. 803(2) which excepts from the hearsay rule a statement relating to a startling event while the declarant was under the stress caused by the event.

A child's account concerning the defendant's conduct was held not to be excluded by the hearsay rule, where the following requirements were met:

> "***(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had

been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. ***."

State v. Duncan (1978), 53 Ohio St. 2d 215, paragraph one of the syllabus; *State v. Litton* (June 23, 1982), Summit App. No. 10514, unreported.

In *Litton*, the defendant had sexual conduct with his nine-year old victim in the morning. The child returned home at 3:00 p.m. and played with her cousin for the remainder of the day. Only at bedtime did she tell her cousin of what had happened. The cousin reported to their grandmother. Both of her grandparents and her mother questioned the victim. When her father came home, he questioned the victim for two hours before notifying police. Applying *Duncan*, this court held that the child's statement to her father was admissible because it appeared that the declarant was still dominated by the nervous excitement generated by the startling event (sexual conduct). *Litton*, supra; *State v. Yost* (Sept. 18, 1985, Summit App. No. 12065, unreported.

The record in this case supports findings that: (A) There was an occurrence startling enough to produce a nervous excitement. Despite defendant's argument, there is insufficient evidence of Jannie's prior sexual history to support a finding that sexual contact with a teacher would not have been a startling event. (B) Jannie's statement was made while he was still dominated by the nervous excitement generated by defendant's conduct. (C) The statement clearly related to the startling event. (D) Jannie had an opportunity to observe personally the matters asserted in his declaration. Under *Duncan*, Jannie's statement to Jackson properly was

admitted.

EXPERT TESTIMONY

The defendant also challenges the admission of the opinion testimony of Dr. Harold Blakelock, based upon the insufficiency of his credentials and lack of personal contact with Jannie. Reviewing the record, we find that Dr. Harold Blakelock was qualified as an expert witness by his knowledge, skill, experience, training or education. Evid. R. 702. Dr. Blakelock's opinion was based upon facts perceived by him and evidence admitted at trial. Evid. R. 703. Accordingly, his opinion properly was admitted as an aid to the court in making the necessary determinations as to the admissibility of Jannie's statement as an excited utterance under the strictures of Evid. R. 803(2) and *Duncan*, supra.

Defendant's second assignment of error is not well taken.

ASSIGNMENT OF ERROR III

> "The rendering of a verdict by the court in a non-jury criminal trial without hearing final arguments denies an accused "assistance of counsel" as guaranteed in the Sixth and Fourteen Amendments and Article 1, Section 10 of the Ohio Constitution."

Defendant argues that the lack of closing argument in his case constitutes a violation of his right to assistance of counsel under *Herring v. New York* (l975), 422 U.S. 853. However, in *Herring*, the defendant affirmatively was denied closing argument, defense counsel having requested final argument and that request having been denied pursuant to a New York statute granting discretion to trial courts to grant or deny final summation.

In the instant case, defendant did not request final argument, nor did he raise the issue of summation to the trial court. We agree with the Twelfth District Court of Appeals; absent an affirmative denial of closing argument, the lack of such argument is not a basis for reversal. *State v. Brown*

(Dec. 30, 1982). Clermont App. No. 1210/1211, unreported.

Defendant argues that the simple absence of summation is reversible error unless there is a "plain showing that there was an intentional waiver of the right." *Columbus v. Woodrick* (1976), 48 Ohio App. 2d 274. However, in *Woodrick*, the court was faced with a "summary pronouncement" of the verdict by the trial court. Here, the record reveals that the court had discussed its analysis of the evidence in chambers with counsel and did not wish to repeat that assessment in court. No objection was registered by defendant's counsel. Given his competent representation of defendant throughout this trial, it is clear that, had counsel wished to object at this point, he would have done so.

Defendant's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "Due process is denied an accused where the conviction rests upon evidence insufficient as a matter of law and/or is manifestly against the weight of the evidence."

A reviewing court will not reverse a verdict where there is substantial evidence upon which a trier of fact reasonably could conclude that all the elements of an offense have been proved beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St. 2d 169, syllabus. Our review, thus, is confined to a determination of whether there was substantial evidence. *Eley, supra* at 172. The evidence shows that defendant brought Eugene Jannie to his home. The two men were alone and Yoder took Jannie into a bedroom. Jannie's statement to Ona Jackson reveals that he and Yoder kissed on the mouth and engaged in oral sex. Yoder's own statement to ACDC officials was that he was sexually aroused. From this evidence, the trier of fact reasonably could conclude, beyond a reasonable doubt, that Yoder committed sexual battery upon Jannie.

Defendant's fourth assignment of error is not well taken.

The judgment of the trial court is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Wayne Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

WILLIAM R. BAIRD
- FOR THE COURT -

QUILLEN, J.
HOFSTETTER, J.
CONCUR

(Hofstetter, J., Retried Judge of the Eleventh District Court of Appeals, sitting by assignment pursuant to Article IV, §6 (C), Constitution).

APPEARANCES:

ROBERT J. BROWN, Assistant Prosecuting Attorney, Silver Building, Wooster, Ohio 44691 for Plaintiff

STEPHEN WALKER, Attorney at Law, The Brownell Building, 1340 Sumner Court, Cleveland, Ohio 44115 for Defendant.

WAYNE COUNTY COMMON PLEAS COURT

STATE OF OHIO	)	
Plaintiff	)	Case No. 84-CR-111
vs.	)	
LESTER S. YODER	)	JUDGMENT ENTRY
Defendent	)	

On March 19, 1985, the defendant was found guilty by a trial to the Court of Sexual Battery, an Aggravated felony of the third degree, in violation of Section 2907.03 (A) (6) of the Ohio Revised Code.

Presentence investigation and report was ordered by the Court upon entry of conviction, and defendant appeared before the Court for sentencing on May 16, 1985, represented by counsel, Mark Baserman. Receipt of the presentence report is acknowledged.

Upon inquiry, the defendant was unable to show cause as to why judgment should not be pronounced. The Court indicated that it had taken into consideration the criteria for sentencing and probation, as set forth in Sections 2929.12 and 2951.02, respectively, of the Ohio Revised Code.

The Court did thereupon sentence said defendant to serve a determinate term of one and one-half (1 1/2) years at the Ohio Department of Corrections and Rehabilitation, Chillicothe, Ohio. Sentence is herewith suspended, and defendant is placed on probation for two (2) years, subject to the following terms and conditions:

1. Obey all local, state and federal laws.

2. Abide by the rules and regulations of the Probation Department.

3. Pay the costs of this action taxed at $_____ .

_____
JOHN H. SCHULER
COMMON PLEAS JUDGE

_____
Robert J. Brown
Assistant Prosecuting Attorney